

Supreme Court, U. S.
FILED

APR 10 1978

MICHAEL RODAK, JR., APK

MICHAEL ROD

**In the
Supreme Court of the United States**

OCTOBER TERM, 1977

NO. **77-1435**

LEO D. SMITH,
Petitioner

versus

UNITED STATES AIR FORCE AND
THE CIVIL SERVICE COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COBB, THURMOND, BAIN &
CLARK, INC.
1665 Frost Bank Tower
San Antonio, Texas 78205
(512) 226-0311

EARLE COBB, JR.
ATTORNEY FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

LEO D. SMITH,
Petitioner

vs.

UNITED STATES AIR FORCE
AND
CIVIL SERVICE COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on January 27, 1978.

OPINION BELOW

The opinion of the Court of Civil Appeals is No. 77-2574 on their Summary Calendar, and is reported in F2d and also appears in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 27, 1978. This petition for

Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. Sec. 1254(1) and 5 U.S.C.A. Sec. 701 and 7501 et seq.

QUESTIONS PRESENTED

1. Is the refusal by a government employee to submit to a psychiatric examination good cause for his termination from employment?

STATUTORY PROVISIONS INVOLVED

United States Constitution Amendments 5 and 14.

United States Code: 5 USCA Sec. 701 et seq., 5 USCA, Sec. 7501 et seq., 28 USCA 1346 (b) and 28 USCA 2101 (c).

STATEMENT OF THE CASE

This being a summary dismissal based upon the pleadings, the pleadings must be accepted as true. They are, in brief, as follows:

LEO D. SMITH was a Civil Service employee of the United States from April, 1956 until July 2, 1973. Lt. Col. Thomas H. Temple, Jr. was his superior at Kelly Air Force Base, Texas. On or about July 2, 1973, LEO D. SMITH was removed from his employment at Kelly Air Force Base, Texas, because he had failed to submit to a psychiatric examination. SMITH objected, all administrative remedies were exhausted, and at all stages Defendants failed to consider retirement of LEO D. SMITH for mental disability.

On June 27, 1977, the Trial Court entered an Order summarily dismissing Plaintiff's cause of action and found that Plaintiff was not mentally incompetent without hearing any evidence (Appendix 18). The Court further found without hearing evidence that the discharge was for good cause. However, the record shows that the only cause for Plaintiff's dismissal was his failure to submit to psychiatric examination.

The Trial Court had no choice but to either (1) reinstate LEO D. SMITH in his former job with payment of all back due benefits and salaries, (2) find him mentally disabled and award him retirement benefits from the date of his termination, or (3) remand the whole matter to the Defendants to determine whether he should be discharged for cause or discharged because of mental disability. To uphold the discharge because of Plaintiff's refusal to submit to a psychiatric examination is contrary to law and contrary to the regulations of Defendants.

REASONS FOR GRANTING THE WRIT

The U.S. Civil Service Commission, in a decision handed down recently and reported in August, 1976, as PH752B 60254 Fitness-For-Duty-Exam, Mental Disability, held as follows:

The appellant's removal was based on charge of repeated acts of disruptive behavior, unacceptable job performance, and insubordination. The charge of insubordination resulted from appellant's failure to report for a psychiatric Fitness-For-Duty examination.

The field office found that the evidence clearly

demonstrated that the agency had been "fully aware for some months that appellant's conduct might be the result of an emotional illness." The agency did not however, file a disability retirement application on appellant's behalf, as required by Section S1-3a (5) of FPM Supplement 752-1. The field office found further that in accordance with Section S10-10 (5) (c) (5) of FPM Supplement 831-1, ". . .the appellant's failure to cooperate with the agency in its efforts to have her examined by a physician did not absolve the agency from its responsibility to initiate a disability retirement application on her behalf which could have been supported by the same documentary evidence relied on to effect appellant's removal." Accordingly, the field office reversed the removal action. Volume II, No. 12, Digest of Significant Decisions.

The cited decision is directly in point. LEO D. SMITH was an investigator for the Air Force. As an investigator it was his duty to ask questions and to determine the facts; however, his superiors apparently became angered with him because he did his job too well and stepped on some toes. Although they charged him with disruptive behavior and unacceptable job performance, as in the case reported by the Civil Service Commission, they did not discharge him for those reasons, nor did they give him a trial on those issues; instead, they demanded that he submit to a psychiatric examination and then fired him for insubordination when he refused to take the examination. The Air Force, in requiring him to submit to the psychiatric examination, did not comply with its own regulations, nor did it have any right to re-

quire him to take the examination unless it had reason to believe that he was emotionally unstable and disabled to perform his work.

The Defendants, therefore, had an obligation to file a disability retirement application on Smith's behalf as required by Section S1-3a(5) of FPM Supplement 752-1.

The Air Force had the right to discharge LEO D. SMITH for good cause for failure to perform his job if that was the case, (but only after a hearing according to Civil Service Rules), or to retire him for disability if he was mentally or emotionally unable to perform his job. DEFENDANTS DID NEITHER.

Also in support of Plaintiff's position is a recommended decision of the United States Civil Service Commission in the matter of John W. King, Docket No. 5 of the Dallas Region, which states,

"It is wrong to use insubordination as a basis for removing an Administrative Law Judge who is unwilling to be examined by a psychiatrist when the underlying cause of his unsatisfactory performance is thought to be his mental condition. In seeking the employee's removal because of insubordination, the agency in this case has acted without regard to his interest under the Civil Service Retirement Act."

The Fifth Circuit has considered a similar point in the case of *Yates vs Manele, et al* 377 F2 888 Fifth Circuit 1967. In that case, the Fifth Circuit, in what appears to be a similar

situation, affirmed the Trial Court but

" . . . without prejudice to the appellant raising, if she chooses, in the court below the issue of her competency on the date of her refusal to submit to the examination."

Judge Young in a concurring opinion states

" . . . if, in fact, she was not responsible then it would be as much an injustice to deprive her of her pension and other rights earned by her during years of satisfactory and creditable service as it would be to punish a defendant for a crime committed under circumstances that would make him legally not responsible for such an offense."

Also supportive of the issue is the case of *Anderson vs Morgan* 263 F2d 903 by the District of Columbia Circuit where the Court under apparently similar circumstances remanded that the case to the Trial Court with instructions "to remand the proceedings to the Treasury Department so that an involuntary application for retirement might be filed under Section 710, which, if sustained, would render the litigation over the separation under Section 652(a) moot. He also suggests that should the involuntary retirement application be disapproved by the Civil Service Commission then the agency should have leave to proceed further in accordance with the applicable statutes and Civil Service regulations."

There is an indication that the United States Supreme Court may be considering this issue in the case of *Pryor vs.*

U.S. under Cause No. 76-1589 submitted January 5, 1977. As soon as the undersigned knows the results of this case, it will be submitted to the Fifth Circuit.

CONCLUSION

The United States Air Force had a right to terminate LEO D. SMITH for cause by following the Civil Service procedures, or they had a right to retire him for mental disability, but only by following the regulations and procedures. They did not have the right to require him to submit to a psychiatric examination, and then fire him for failure to do so. The regulations, rulings and cases make this extremely clear. Therefore, the Trial Court erred in summarily dismissing Plaintiff's cause of action. The Trial Court had the option of trying the issue of good cause for determination, or mental disability for retirement, or remanding the entire case to the Civil Service Commission and the Air Force for decision under the applicable law, rules and regulations; but the Court did not have the right to summarily hold that the Plaintiff's refusal to submit to a psychiatric examination was valid grounds for discharge and denial of retirement, nor did it have the right to assume Plaintiff was mentally competent.

Respectfully submitted,
COBB, THURMOND, BAIN
& CLARK, INC.
1665 Frost Bank Tower
San Antonio, Texas 78205
(512) 226-0311

BY:
EARLE COBB, JR.
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ were served on United States Attorney, 655 East Durango Street, San Antonio, Texas 78205, this 25th of April, 1978.

EARLE COBB, JR.

OPINION OF UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Leo D. SMITH, Plaintiff-Appellant,

v.

UNITED STATES AIR FORCE et al.,
Defendants-Appellees.

No. 77-2574
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 27, 1978.

Appeal was taken from the action of the United States District Court for the Western District of Texas, at San Antonio, John H. Wood, Jr., J., in dismissing an action alleging improper discharge from civil service employment. The Court of Appeals held that dismissal of the action was proper.

Affirmed.

1. Federal Courts 244

Where, in his suit for allegedly improper dismissal from civil service employment, plaintiff did not allege discrimina-

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part. 1.

tion on basis of race, color, religion, sex, or national origin, Title VII of Civil Rights Act of 1964 furnished federal district court with no subject matter jurisdiction over suit. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

2. Federal Courts 974

Federal Tort Claims Act provided no jurisdiction for federal district court in action for allegedly improper discharge from civil service employment where United States, if it were private individual, would not have been liable for manner in which such discharge took place. 28 U.S.C.A. § 1346(b).

3. Constitutional Law 318(2) Officers 72(1)

In action for alleged improper discharge from civil service employment, trial court properly concluded that there had been no departure from required standard of procedural due process and that plaintiff's termination was based upon substantial grounds in his failure to report for psychiatric examination as ordered. 5 U.S.C.A. § 701 et seq., 7501 et seq.

4. Officers 72(2)

In cases involving termination of federal employment, scope of judicial review is limited to determination of whether administrative action has complied with required procedural due process or whether administrative action is arbitrary or capricious. 5 U.S.C.A. § 701 et seq., 7501 et seq.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

Appellant Leo Smith filed suit against the Air Force, Secretary of the Air Force Reed, and Kelly Air Force Base Chief Safety Officer Temple, alleging improper discharge from civil service employment for his refusal to obey an order to take a psychiatric examination. He cites Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-5(f), and the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b), as bases for subject matter jurisdiction. On the Government's motion for dismissal, Fed. R. Civ. P. 12(b)(6), or in the alternative for summary judgment, Fed. R. Civ. P. 56, the lower court dismissed the action. In its order, the lower court found that it lacked jurisdiction to adjudicate this claim; that even if it did have jurisdiction, appellant's discharge was for just cause; that the actions of neither the Air Force nor the Civil Service Commission were arbitrary, capricious, or constituted an abuse of discretion; and that appellant was not mentally incompetent at the time of his discharge. For the reasons set forth below, we affirm.

[1] Nowhere in his complaint, or elsewhere in the record, did appellant allege discrimination on the basis of race, color, religion, sex, or national origin, a prerequisite to relief under 42 U.S.C.A. § 2000e et seq. Accordingly, this statute did not furnish the court below with subject matter jurisdiction.

[2] Neither did 28 U.S.C.A. §1346(b) provide a basis for jurisdiction since the United States, if it were a private individual, would not have been liable for the manner in which appellant alleges he was discharged.

[3] The facts pleaded, however, arguably conferred jurisdiction on the lower court under 5 U.S.C.A. §7501 et seq. and 5 U.S.C.A. § 701 et seq. (Administrative Procedures Act). Assuming that jurisdiction did exist under these statutes, even though such jurisdiction was not asserted by appellant in his complaint and is not argued in his brief on appeal, we nonetheless find the lower court's dismissal proper.

[4] In cases involving the termination of federal employment, the scope of judicial review is limited to a determination of whether the administrative action has complied with the required procedural due process or whether the administrative action is arbitrary or capricious. *Thurman v. TVA*, 533 F.2d 180, 183 (5th Cir. 1976); *Dozier v. United States*, 473 F.2d 866, 868 (5th Cir. 1973). The trial court confined its review to these matters, and correctly concluded there had been no departure from the required standard of procedural due process. Moreover, the administrative record conclusively established that appellant's termination was based upon substantial grounds -- his failure to report for the ordered examination, see *Yates v. Manale*, 377 F.2d 888 (5th Cir. 1967), cert. denied, 390 U.S. 943, 88 S.Ct. 1037, 19 L.Ed. 2d 1139 (1968); *May v. Civil Service Commission*, 230 F.Supp. 659 (W.D.La. 1963) -- and was therefore not arbitrary or capricious.

AFFIRMED.

Supreme Court, U. S.
FILED

JUN 8 1978

No. 77-1435

MICHAEL RUDAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEO D. SMITH, PETITIONER

v.

UNITED STATES AIR FORCE, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1435

LEO D. SMITH, PETITIONER

v.

UNITED STATES AIR FORCE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

Petitioner, Leo D. Smith, seeks judicial review of his discharge from civil service employment. Although he has relied on inapposite provisions,¹ we assume the district court had jurisdiction to entertain petitioner's complaint under 28 U.S.C. 1331(a), as amended by Pub. L. 94-574, 90 Stat. 2721.

¹Petitioner now invokes subject matter jurisdiction under 5 U.S.C. 701 and 7501. However, the Administrative Procedure Act "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107.

In his initial complaint filed in the United States District Court for the Western District of Texas, he alleged jurisdiction under Title VII of the Civil Rights Act, as added, 86 Stat. 111, 42 U.S.C. (Supp. V) 2000e-16, and under the Federal Tort Claims Act, 28

On the merits, however, we submit that both courts below correctly held that petitioner's refusal to submit to a psychiatric examination constituted just casue for his discharge, that he had been accorded due process, and that the administrative actions complained of were neither arbitrary nor capricious. See, e.g., *Yates v. Manale*, 377 F. 2d 888 (C.A. 5), certiorari denied, 390 U.S. 943; *May v. United States Civil Service Commission*, 230 F. Supp. 659 (W.D. La.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

U.S.C. 1346(b). However, both the district court and the court of appeals correctly held that jurisdiction would not lie under either of these statutes because petitioner had not alleged that he was discriminated against on the basis of his race, color, religion, sex or national origin and because the United States would not have been liable for the manner in which petitioner was discharged had it been a private individual.